IN THE SUPREME COURT OF MISSOURI

Supreme Court No. SC85652

R.W.,
Appellant,

V.

Michael Sanders, et al.,
Respondents.

APPEAL FROM THE
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
SIXTEENTH JUDICIAL CIRCUIT
KANSAS CITY, MISSOURI
DIVISION 12
THE HONORABLE EDITH MESSINA, CIRCUIT COURT JUDGE

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from the judgment from the Honorable Edith Messina, Circuit Court of Jackson County, Division 12 which denied appellant's request for declaratory judgment and preliminary and permanent injunction. Relief was requested in order to prevent the improper enforcement of Mo. Rev. Stat. §589.400, et seq. the Missouri sex offender registration statute, against R.W. because it is inapplicable to him and because such enforcement would cause a significant deprivation of R.W.'s substantial rights and liberty interests. The trial court issued its judgment on September 8, 2003. The trial court issued a one-page judgment which denied the requested relief without addressing the arguments made therein. The result of the court ruling requires R.W. to register as a sexual offender with the chief law enforcement officer of the county or face prosecution by the county prosecutor for the Class A misdemeanor of failure to register, pursuant to §589.425. The trial court did not address the arguments made by appellant involving the interpretation and application of this statute and the question of whether its application to the appellant would be unconstitutional.

Pursuant to Article V, Section 3 of the Missouri Constitution, the Missouri Supreme Court shall have exclusive appellate jurisdiction in all cases involving the validity of a statute or provision of the constitution of this state. The circumstances and legal issues presented in this appeal give the Supreme Court of Missouri original appellate jurisdiction in that the questions presented involve the

interpretation and the constitutionality of a state statute. R.W. asserts that the sexual offender registration statute, *§589.400, RSMo. 2000 (*Cum. Supp *2003),* conflicts *with §610.105, RSMo. 2000 (*Cum. Supp *2003),* which states that suspended imposition of sentences are closed records. Furthermore, R.W. asserts that the trial court erroneously applied the statute to him in a manner which resulted in the application of an impermissible *ex post facto* law, in violation of the United States Constitution, Article 1, Section 9, Clause 3 and the Missouri Constitution, Article 1, Section 13. In addition, the application of the law to appellant constitutes an impermissible retrospective law, in violation of Missouri Constitution, Article 1, Section 13.

R.W. asserts that the trial court erroneously denied him relief from the application of §589.400, *et. seq*., RSMo. 2000 (Cum. Supp 2003), and requests relief from this court to vacate the judgment of the trial, court and also requests that this court issue its ruling on the statute's proper interpretation and application to the facts of this case, as well as its conflict with §610.105 RSMo. 2000 (Cum. Supp 2003). This request is relevant and within the power of this court in that the trial court ignored plaintiff's request to do so through declaratory judgment and preliminary and permanent injunction.

This action is one involving the question of whether the appellees should be restrained from enforcing Mo. Rev. Stat. §589.400, *et. seq*. against plaintiff because Mo. Rev. Stat. §610.105, RSMo. 2000 (Cum. Supp 2003) provides that suspended imposition of sentences, such as was accorded appellant, are closed

records and therefore appellant should not be required to register as a convicted sexual offender pursuant to §589.400 *et. seq.* The sexual offender registration statute does not apply to appellant and is unconstitutional as applied since such application would cause a forfeiture of plaintiff's valuable liberty interests and the abrogation of his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 13 of the Missouri Constitution. Appellant invokes the jurisdiction of this Court to construe a conflict between two statutes of this state and to determine the validity and constitutionality of §*589.400 et. seq. RSMo*. 2000 (Cum. Supp *2003*) when applied to this appellant. Additionally, the application of Mo. Rev. Stat. §589.400 *et. seq.* to appellant violates the prohibition contained in Article 1, Section 13 of the Missouri Constitution against both retrospective laws and *ex post facto* laws.

This is a Justiciable Controversy

"A justiciable controversy exists when the plaintiff has a legally protectable interest at stake, a substantial controversy exists between the parties with genuinely adverse interests, and that controversy is ripe for judicial determination." Missouri Health Care Assoc. v. Attorney General, *953 S.W.2d 617, 620* (*Mo. banc 1998*), citing State ex rel. Chilcutt v. Thatch, *221 S.W.2d 172,176 (Mo. banc 1949*). Further, "[a] ripe controversy exists if the parties' dispute is developed sufficiently to allow the court to make an accurate determination of the facts, to resolve a conflict that is presently existing, and to grant specific relief of a conclusive character." Missouri Health Care Assoc., *supra*, 953 S.W.2d at 621. The Missouri Supreme Court has determined that a pre-enforcement constitutional challenge to a particular statute is a ripe controversy "when the facts necessary to adjudicate the underlying claims [are] affecting the plaintiffs in a manner that [give] rise to an immediate, concrete dispute." *Id.*

In this case, the Jackson County Sheriff's department has contacted appellant and demanded that he register as a sex offender pursuant to §589.400 *et seq*. Appellant has refused to register on the grounds that §610.105 RSMo. 2000 (Cum. Supp 2003) prevents the provisions of §589.400, *et. seq*. from being applied to him. Further, appellant has refused to register on the grounds that the statute is unconstitutional as applied to him due to the prohibitions against *ex post facto* laws and retrospective laws in the Missouri Constitution.

Failure to register is a Class A misdemeanor and any subsequent failure to register is a Class D felony. Mo. Rev. Stat. §589.425 Mo. RSMo. (2000). The Jackson County Missouri Sheriff's office, through a letter dated April 4, 2003, expressed an intent to refer appellant's failure to register to the Jackson County prosecutor for charges. (L.F. at 13-14)[1]. The threat of prosecution is imminent and constitutes a continuing threat. It is unnecessary for a party to expose himself to actual arrest or prosecution before he can make his constitutional challenge to the statute which provides the basis for the threatened prosecution. Steffel v. Thompson, *92 S. Ct. 1209, 1216 (1974*); Babbit v. United Farm Workers Nat. Union, *99 S. Ct. 2301, 2308 (1979).* It is sufficient for the injury to be impending. Steffel, *92 S.Ct. At 1216*. The issue is ripe for a decision and this court is empowered to determine the rights of the parties. There is a concrete injury to appellant's liberty and property interests if he is required to submit to a statute which does not apply to him.

[1] Footnote: The Record on Appeal is designated in this prief as follows: The Legal File is denoted by L. F. The transcript of the hearing before the trial court is denoted by Tr. The Supplemental Legal File prepared by appellant is denoted by Supp. L. F.

STATEMENT OF FACTS

Factual Statement

On March 30, 1994, appellant, R.W., was charged with one count of sodomy and one count of sexual assault in the first degree. (Tr. P. 6; Supp L. F. pp. 2-3). On February 9, 1995, appellant pleaded guilty to Count II, sexual assault in the first degree, and the charge in Count I, sodomy, was dismissed. (Supp L. F. pp. 7-9). In exchange for his guilty plea, appellant received a suspended imposition of sentence on the charge of sexual assault in the first degree and was placed on five years probation. (Tr. page 6). The crime to which appellant pleaded guilty involved a minor. (Supp. L. F. pp. 1-5, 16).

Appellant successfully completed his probation without ever receiving any probation violations. (Tr. page 7). On December 6, 1998, pursuant to a motion filed by appellant, his probation was terminated early by the Jackson County, Missouri Circuit Court. (Tr. page 7).

Appellant currently resides in Raytown, Missouri at an address on Willow Avenue in Jackson County, Missouri and has so resided there for the past 15 years. (Tr. page 7). Appellant resided at that address when he was charged with the crimes, during the dependency of his probation and consecutively up to and including the current time. (Tr. page 7). During the period of appellant's probation, and as a condition of his probation, he registered as a sexual offender pursuant to Section 589.400 *et. seq*. (Tr. Pages 7-8; Supp. L. F. 22). Appellant never re-registered as a sexual offender. After the completion of his probation,

appellant continued to reside lawfully and quietly in his same Jackson County resident for several years.

On April 4, 2003, appellant received a letter from the Jackson County Sheriff's Department requiring him to register as a sexual offender and required him to re-register every 90-days. (L.F.13-14). Appellant refused to register as a sexual offender, hired the undersigned counsel, and mailed a letter to the Jackson County Missouri Sheriff's department objecting to the requirement that he register as a sexual offender based on, *inter alia*, the suspended imposition of sentence he received on this charge and the law being applied to him in an *ex post facto* manner. (L.F. 15-16).

On May 22, 2003, appellant filed his petition for declaratory judgment, temporary restraining order and preliminary and permanent injunction. (L. F.1-16). On June 19, 2003, the cause came up for an evidentiary hearing before the Honorable Edith L. Messina in Division 12 of the Sixteenth Judicial Circuit Court of Missouri, at Kansas City. (Tr. 3).

Appellant was the only witness to testify at the hearing on June 19, 2003. Appellant testified that he had received a suspended imposition of sentence for the charge of sexual assault in the first degree on February 9, 1995, that he successfully completed his probation and that the probation was terminated early on December 6, 1998. (Tr. 6-7).

Further, appellant testified that he had been the subject of public ridicule and scorn and threats as a result of being on the Sexual Offender Registry. (Tr. p.

8). Appellant testified that someone had attempted to blackmail him and stalked him. *Id*. Appellant also testified that someone threatened to call his wife's place of business and inform his wife's employer that he was a sexual offender. (Tr. p. 8). Appellant also testified that his vehicles have been vandalized and that the tires on his vehicles have been punctured. (Tr. p. 9). Appellant testified that where he worked at night, somebody had written graffiti referring to the charges which were filed against him (Tr. p. 9).

Appellant also testified that he received a lot of hang-up phone calls. (Tr. p. 9). Appellant further testified that he was notified by the Jackson County Sheriff's Department, by letter dated April 4, 2003, to register again as a sexual offender and at that point appellant obtained an attorney to protest the registration requirement (Tr. p.10). No other evidence was taken at the hearing on June 19, 2003. (Tr. pp. 12-21).

The facts are not in dispute. Respondents subsequently filed their Defendants' Brief in Response to Plaintiff's Supplemental Suggestions in Support of Plaintiff's Petition for Declaratory Order, and Preliminary and Permanent Injunction, based on the testimony introduced at the June 19, 2003 hearing (L.F. 25-32). Respondents also filed their answer to appellant's petition on July 7, 2003 (L.F. 33-40). The state's brief at the trial court level argued the merits of the case.

At the hearing before the trial court, respondents repeatedly argued that the provisions of §§589.400-589.425 are punitive laws. (Tr. 18, 30).

Factual Background of Section 610.105 and the the Missouri Sex Offender Registration Statutes

In 1994, the Missouri legislature passed Mo. Rev. Stat. §566.600, commonly known as "Megan's Law", which requires certain persons convicted of a sexual offense under Chapter 566 of the Missouri Revised Statutes to register their name and address, under certain circumstances, with the chief law official of the county within fourteen days of coming into any county in Missouri. Mo. Rev. Stat. §§566.600 *et. seq.* (repealed). The statute became effective on January 1, 1995. In 1997, Mo. Rev. Sta. §§566.600 *et. seq*. was repealed and the current statute, Mo. Rev. Stat. §§589.400 *et. seq.* was enacted in its place. This statute became effective November 1, 1997. §§589.400 *et. seq*. and was the same as §566.600 *et. seq.* in all respects, with the addition of some specifically enumerated offenses, and a revision which shortened the compliance time frame from fourteen to ten days.

On August 28, 2002,Missouri Rev. Stat. §589.400 *et. seq*. was again revised. Instead of the previous §589.400 requiring that any person register with the chief law enforcement official of the county within 10-days of coming into any county in Missouri, language was substituted which states that any persons to whom the statute applied, if not currently registered in the county of residence, shall register with the chief law enforcement official in such county within 10 days of August 28, 2002. §589.400.2 RSMo. 2000 (Cum. Supp. 2002).

The Ninety-Second General Assembly again revised Missouri Rev. Stat. §§589.400 *et. seq*. in 2003. The current law requires a sexual offender to register in the county of his or her residence, if not currently registered in the county of his or her residence, within ten days of August 28, 2003. §589.400.2 RSMo. 2000 (Cum. Supp. 2003). The new law also added campus law enforcement agencies to those law enforcement agencies which can request a copy of the registration form from the county's chief law enforcement official. *Id.*

In addition, §589.407 RSMo. 2000 (Cum. Supp. 2003) now requires registrants to list their enrollment within any institutions of higher education. §589.414.3 RSMo. 2000 (Cum Supp. 2003) states that any person who is required to register as a sexual offender who changes his or her enrollment or employment status with any institution of higher education within the state to inform the chief law enforcement officer of the county of such change within seven days after such change is made.

More significantly, the Ninety-Second General Assembly passed §43.650 RSMo. 2000 (Cum. Supp. 2003), which requires the Missouri State Highway Patrol to maintain a web page on the internet which shall be open to the public and which shall contain the name of the sexual offender, the address of the offender, a photograph of the offender and the crime or crimes for which the offender was convicted of. *Id.* (Emphasis supplied).

As the letter from the Jackson County Sheriff's Department pointed out, appellant was required to register every 90 days. (L.F. 13-14). Section 589.414.5 states as follows:

> "In addition to the requirements of Sub Section 1 and 2 of this Section, the following offenders shall report in person to the County law enforcement agency every 90-days to verify the Information contained in their statement made pursuant to Section 589.407: (1) any offender registered as a predatory or persistent sexual offender under the definitions found in Section 558.018, R.SMo.; (2) any offender who is registered for a crime where the victim was less than eighteen years of age at the time of the offense; (3) any offender who has plead guilty or been found guilty pursuant to Section 589.425 of failing to register or submitting false information when registering." §589.414 RSMo. 2000 (Cum. Supp. 2003).

The victim in appellant's case was less than eighteen years of age (Supp. L. F. 2-6), and consequently §589.414 applied to appellant, and, as the letter from the office of the sheriff indicated, appellant was being requested to register in person every ninety days. (L.F. 13-14).

Section 610.105 was first enacted in 1973, § 610.105 RSMo. (Cum. Supp. 1973). At that time, the statute read:

610.105. *Effect of nolle pros or dismissal on records*.-If the person arrested is charged but the case is subsequently nolle possed, dismissed, or the accused is found not guilty in the court in which the action is prosecuted, official records pertaining to the case shall thereafter be closed records to all persons except the person arrested or charged. § 610.105 RSMo. (Cum. Supp. 1973).

At that time this statute made no mention of suspended imposition of sentences. §610.105 RSMo. (1973). In 1981, §610.105 was revised to include suspended imposition of sentences as closed records. §610.105 RSMo. (Cum. Supp. 1981). The statutory language regarding suspended imposition of sentences has remained the same since 1981 even though the statute has been revised several times. [*See other amendments:* §610.105 RSMo., 1986 (Cum Supp. 1993); §610.105 RSMo. 1994 (Cum. Supp: 1998); and §610.105 RSMo. 2000 (Cum. Supp: 2003)].

In 2003 the current §610.105 was enacted. §610.105 RSMo. 2000 (Cum. Supp. 2003). In its current form, the statute reads, in relevant part:

"If the person arrested is charged but the case is subsequently nolle prossed, dismissed, or the accused is found not guilty or imposition of sentence is suspended in the court in which the action is prosecuted, official records pertaining to the case shall thereafter be closed records when such

case is finally terminated except as provided in section 610.120 and except that the court's judgement or order or the final action taken by the prosecutor may be accessed." §610.105 RSMo. 2000 (Cum. Supp. 2003).

Thus, §610.105, stating that suspended imposition of sentences shall be closed records, has been in effect in one form or another for twenty-three (23) years. §610.105 regarding suspended imposition of sentences had been the law for over fourteen (14) years when the first sexual offender registration law, §566.600 RSMo. (1994), was enacted in 1995.

§610.120 RSMo. 2000 (Cum. Supp. 2003), referred to in §610.105, lists specific exceptions where closed records may be accessed. That statute reads, in part, as follows:

§610.120. Records to be confidential-accessible to whom, purposes-child care, defined.- 1. Records required to be closed shall not be destroyed; they shall be inaccessible to the general public and to all persons other that the defendant excepts as provided in this section and section 43.507, RSMo. The closed records shall be available to: criminal justice agencies for the administration of criminal justice pursuant to section 43.500, RSMo, criminal justice employment, screening persons with access to criminal justice facilities, procedures, and sensitive information; to law enforcement agencies for issuance or renewal of a license, permit, certification, or registration of authority from such agency

including but not limited to watchmen, security personnel, private investigators, and the sentencing advisory commission created in section 558.019, RSMo. for the purpose of studying sentencing practices, in accordance with section 43.507, RSMo; to qualified entities for the purpose of screening providers defined in section 43.540, RSMo; the department of revenue for driver license administration; the division of worker's compensation for the purposes of determining eligibility for crime victims' compensation pursuant to sections 595.010 to 595.075 RSMo, department of health and senior services for the purpose of licensing and regulating facilities and regulating in-home services provider agencies and federal agencies for purposes of criminal justice administration, criminal justice employment, child, elderly or disabled care employment, for such investigative purposes as authorized by law or presidential executive order.

2. These records shall be made available only for the purposes and to the entities listed in this section A criminal justice agency receiving a request for criminal history information under its control may require positive identification, to include fingerprints of the subject of the record search, prior to releasing closed record information. Dissemination of closed and open records from the Missouri criminal records repository shall be in accordance with section 43.509 RSMo. All records which are closed records shall be kept in separate records which are to be held confidential and, where possible, pages of the public record shall be retyped or rewritten

> omitting those portions of the record which deal with the defendant's case. If retyping or rewriting is not reasonable because of the permanent nature of the record books, such record entries shall be blacked out and recopied in a confidential book. *Id.*

In the many specific exceptions listed in this statute, where closed records are made available, the statute does not mention §§589.400-589.425. *Id.* Thus §610.105 RSMo. 2000 (Supp. 2003) makes suspended imposition of sentences closed records, and the sexual offender registration list is not included as an exception to such closed records. §610.120 RSMo. 2000 (Supp. 2003).

POINT I

The trial court erred in denying Appellant's motion for declaratory judgment and preliminary and permanent injunction, in that application of the Missouri Sexual Offender Registration Statutes to Appellant violates Appellant's right to due process of law under the Fifth and Fourteenth Admendments to the United States Constitution and Article I, Section 10 of the Missouri constitution, in that Sections 589.400-589.425, RSMo., do not apply to Appellant, because 1) the plain language of the statutes does not include registration of convicted sex offenders who receive a suspended imposition of sentence, 2) Section 610.105, RSMo., states that when imposition of sentence is suspended, official records pertaining to the case shall thereafter be closed records in such cases finally terminated, and 3) under the rules of statutory construction, Section 610.105 takes precedence over Sections 589.400-589.425.

Principal Authorities Cited:

1. **Yale v. City of Independence, 846 S. W. 2d 193 (Mo. banc 1993)**
2. **State v. Stewart, 832 S. W. 2d 911 (Mo. banc 1992)**
3. **State v. Treadway, 558 S. W. 2d 646 (Mo. Banc 1997)**
4. **J. S. v. Beaird, S. W. 3d 875 (Mo. Banc 2002).**

POINT II

The trial court erred, to the prejudice of appellant, in denying appellant's Motion For Declaratory Judgment and Preliminary and Permanent Injunction because substantial evidence showed that the Missouri Sex Offender Registration Statutes, Mo. Rev. Stat. §§ 589-400- 589.425, as interpreted by the trial court and applied to this appellant, constitute an impermissible *ex post facto law* in violation of the United States Constitution, Article I, Section 9, clause 3, and the Missouri Constitution, Article I, Section 13.

Principal Authorities Cited:

1. **Article I, Section 13, Missouri Constitution**

1. **Smith v. Doe, 123 S. Ct. 1140 (2003)**

2. **Kennedy v. Mendoza-Martinez, 372 U. S. 144 (1963).**

POINT III

The trial court erred in denying appellant's motion for declaratory judgment and preliminary and permanent injunction in that equitable estoppel should operate against the state and prevent it from enforcing the statute against appellant because the application of the Missouri Sex Offender Registration Statutes, Mo. Rev. Stat. §589-400-589.425, to appellant would impose new legal obligations upon appellant and constitute an impermissible retrospective application of law in violation of the Missouri Constitution, Article I, Section 13.

Principal Authorities Cited:

3. Article I, Section 13, Missouri Constitution

2. State ex rel. Webster v. Cornelius 729 S. W. 2d 60 (Mo. App Ed. 1987)

3. U. S. Life Title Ins. Co. v. Brents, 676 S. W. 2d 839 (Mo. App W. D. 1984)

4. State ex rel. Western Outdoor Adv. v. Highway Com'n, 813 S. W. 2d (Mo. App W. D. 1991).

ARGUMENT I

The trial court erred in denying Appellant's motion for declaratory judgment and preliminary and permanent injunction, in that application of the Missouri Sexual Offender Registration Statutes to Appellant violates Appellant's right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri constitution, in that Sections 589.400-589.425, RSMo., do not apply to Appellant, because 1) the plain language of the statutes does not include registration of convicted sex offenders who receive a suspended imposition of sentence, 2) Section 610.105, RSMo., states that when imposition of sentence is suspended, official records pertaining to the case shall thereafter be closed records in such cases finally terminated, and 3) under the rules of statutory construction, Section 610.105 takes precedence over Sections 589.400-589.425.

[Standard of review – The standard of review in a declaratory judgment case is the same as in any other court – tried case. Guyer v. City of Kirkwood, 38 S. W. 3d 412, 413 (Mo. banc. 2001). The judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Id.*]

§610.105 RSMo. 2000 (Cum. Supp. 2003) states that when a criminal defendant is provided with a suspended imposition of sentence, official records pertaining to that case shall be closed records when such case is finally terminated. The statute then lists certain exceptions to the rule, but those exceptions do not include the Sexual Offenders Registration Act (SORA), §§589.400-589.425.

SORA requires anyone who has been convicted of, been found guilty of, or plead guilty to committing a felony of Chapter 566 RSMo., since July 1, 1979, to publicly register as a sex offender. §589.400 (1) RSMo. 2000 (Cum. Supp. 2003). The registration is a public record and now includes a state website that includes an offender's name, address, photograph and criminal convictions. §43.650 RSMo. 2000 (Cum. Supp 2003).

A conflict thus exists between the two statutes, §610.105 and §§589.400-589.425. §610.105 requires the records to be closed, and §§589.400-589.425 require the records to be open. The issue herein is which statute prevails. An initial, brief examination of the purpose of §610.105 is thus in order.

It can be safely assumed that one intent of the legislature in enacting § 610.105 was to keep first offenders' records clean and to prevent such offenders from the continuing prejudice and adverse consequences resulting from criminal convictions after the probationary term was over. In construing a statute, the goal is to give effect to the intent of the legislature. Leiser v. City of Wildwood, 59 S. W. 3d 597 @ 603 (Mo. App. E. D. 2001). To require recipients of suspended imposition of sentences to officially register as convicted sexual offenders would

defeat the purpose of §610.105. Suspended imposition of sentences have been referred to as a "hybrid in the law," because there is no final judgement, and appeal cannot be taken therefrom, and they are not convictions. State v. Bachman, 675 S. W. 2d 41, 45 (Mo. App. W. D. 1984).

In Yale v. City of Independence, 846 SW 2d 193 (Mo banc 1993), this Honorable Court had the occasion to decide whether the disposition of suspended imposition of sentence constitutes a conviction in the context of a fireman who was suing the City of Independence over his wrongful discharge. The fireman had pleaded guilty to the crime of sodomy and received a suspended imposition of sentence. *Id.* @ 193. The city subsequently fired the fireman finding that the suspended imposition of sentence the fireman had received constituted a felony conviction according to the city's personnel manual.

In deciding for the fireman and against the City of Independence, this Honorable Court stated:

> "The obvious legislative purpose of the sentencing alternative of suspended imposition of sentence is to allow a defendant to avoid the stigma of a lifetime conviction and the punitive collateral consequences that follow. That legislative purpose is further evidenced in the statutes concerning closed records; under §610.105 RSMo. (1986), if imposition of sentence is suspended, the official records are closed following successful completion of probation and termination of the case. Closed records are made available only in limited circumstances and are

largely inaccessible to the general public. §610.120, RSMo. (Cum. Supp. 1991). Thus, with suspended imposition of sentence, trial judges have a tool for handling offenders worthy of the most lenient treatment. Worthy offenders have a chance to clear their records by demonstrating their value to society through compliance with conditions of probation under the guidance of the court." *Id.* @ 195.

This Honorable Court's opinion in Yale, *supra*, clearly sets forth the legislative intent behind §610.105 RSMo. and supports appellant's argument that the statute should prevail over SORA. Appellant pleaded guilty in 1995 to a sex crime and in return received a suspended imposition of sentence to avoid the "stigma of a lifetime conviction and the punitive collateral consequences that follow." *Id.* Appellant subsequently demonstrated his "value to society through compliance with conditions of probation under the guidance of the court." *Id.*

As in Yale, *supra*, this Honorable Court Should uphold the legislative intent behind §610.105 RSMo and allow appellant to avoid a lifetime stigma and the punitive collateral consequences stemming from §589.400 *et. seq*. Such a decision by this Honorable Court is especially warranted in light of the fact that appellant successfully completed his probation and was in fact, discharged early from his probation on account of good performance (Tr. P. 7). Appellant upheld his end of the plea bargain he made with the state, and the state should be required

to uphold its end, i. e., providing appellant with a suspended imposition of sentence which means what it says. (Supp. L. F. 11).

Appellant pleaded guilty to a sexual offense involving a minor on the ninth day of February, 1995. (Supp. L. F. 7-9). In exchange for appellant's plea of guilty, the prosecution recommended to the court that appellant receive a suspended impostion of sentence pursuant to §610.105 RSMo. (Tr. 6; Supp. L. F. 11). The trial court agreed and appellant received a suspended imposition of sentence. (Supp. L. F. 2-22).

Appellant successfully completed his probation and was discharged from probation early on December 6, 1998. (Tr. 7).

Now, nine (9) years later, the State of Missouri is attempting to force appellant to register as a sexual offender publicly under threat of prosecution. (L. F. 13-14).

With the clear purpose of the legislation behind §610.105 in mind, See Yale v. City of Independence, *supra*, a review of statutory construction canons is in order. Several statutory construction canons exist in Missouri law which indicate §610.105 prevails over §589.400 *et. seq* when the issue is whether the recipient of the suspended imposition of sentence must register pursuant to §589.400. *In pari materia* means " upon the same matter or subject". Statutes *in pari materia* are to be construed together.

In Martinez v. State, *24 S.W.3d 10 Mo. App. ED* (*2000*), the Eastern District Court of Appeals had an occasion to construe the expungement statute in Missouri

regarding arrest records. The court stated that when construing the statute, the court's primary role is to ascertain the intent of the legislature from the language used in the statute, and if possible, to give effect to that intent. Id at p. 16; See also Abrams v. Ohio Pacific Express, *819 S.W.2d 338* (*Mo. Banc 1991*). The court stated that when determining the legislative intent, words and phrases used in the statute are to be construed and given their plain, ordinary and usual meaning. *Id*. @ p. 16. The Court ruled that the expungement statute, § 610.122, RSMo., must be read *in paria materia* with related statutes and found that even though §610.122 only allowed expungement upon a finding that no charges would be pursued, the legislative intent allowed for expungement after a defendant had been acquitted on such charges. The Court of Appeals for the Eastern District ruled that that statute must be read in conjunction with other statutes related to the same subject matter *(in pari materia*) and decided that the defendant in that case was entitled to expungement even though the words of § 610.122 read that he was only entitled to expungement if no charges "would be pursued", due to the fact that charges had been pursued in this case, but the defendant had been acquitted. *Id.* pp. 7-19.

The court stated that the legislature is presumed to be aware of the state of the law at the time it enacts a statute and further that because remedial statutes are to liberally construed, and statutes relating to expungement of arrest records have been universally recognized by courts as being remedial in nature, the defendant there was entitled to expungement, despite the fact that charges had been pursued in this case when the statute read that persons could only be eligible for

expungement if " no charges would be pursued as a result of the arrest". *Id.* The court stated that the historical backgrounds of the statutes suggested that if the legislature had intended to exclude individuals who had been tried and found not guilty from the opportunity to seek expungement of their arrest records, it would have clearly so indicated in the statute. *Id.* at 17. The Eastern District Court of Appeals held that the trial court had misinterpreted Section 610.122 and erred in denying the defendant his petition for expungement. *Id* at 19.

Likewise, in the case at bar, Section 610.105 was first enacted in 1973, §610.105 RSMo. (Cum. Supp. 1973). At that time, the statute read;

> 610.105. *Effect of nolle pros or dismissal on records*.-If the person arrested is charged but the case is subsequently nolle prossed, dismissed, or the accused is found not guilty in the court in which the action is prosecuted, official records pertaining to the case shall thereafter be closed records to all persons except the person arrested or charged. §610.105 RSMo. (1973).

At that time the state made no mention of suspended imposition of sentences. §610.105 RSMo. (1973).

In 1981, §610.105 was revised to include suspended imposition of sentences. §610.105 RSMo. (Cum. Supp. 1981). The current language including suspended imposition of sentences has remained in the statute since then. [[*See other amendments:* §610.105 RSMo., 1986 (Cum Supp. 1993); §610.105 RSMo. 1994 (Cum. Supp: 1998); and §610.105 RSMo. 2000 (Cum. Supp: 2003)].

The most current rendition of §589.400, §589.400 RSMo. 2000 (Cum. Supp. 2003) continues to omit suspended imposition of sentences from its reach.

Because Section 589.400 et. seq. was passed in 1995 and the legislature is presumed to be aware of the state of law at the time it enacts a statute, In the Matter of Nocita, *914 S.W.2d 358* (*Mo. Banc. 1996*), the Missouri legislature must have been aware of the suspended imposition of sentence statute (§610.105) at the time SORA was first passed and decided not to include suspended imposition of sentences under SORA.

Appellant asserts that because statutes relating to expungement of arrest records have been universally recognized by courts as being remedial in nature, State ex rel. Curtis v. Crow, *580 S.W.2d 753* (*Mo. Banc 1979*), and remedial statutes are to be liberally construed so as to effect their beneficial purpose, Martinez v. State, *supra*, @ 19, Section 610.105 must be liberally construed and read in conjunction with SORA so as to effect its beneficial purpose, i.e., to close the records of recipients of suspended imposition of sentences and preclude such recipients from having the stigma of convicted criminals and the prejudice which results from such criminal conviction.

The repeal of one statute by another is disfavored, and if two statutes cannot be reconciled then both should be given effect. St. Charles County v. Director of Revenue, *961 S.W.2d 44*, (*Mo. Banc 1998*). The only rational way to reconcile Section 610.105 and SORA is to conclude that the legislature intended to create an exception to registration for suspended imposition of sentences.

In construing a statute it is appropriate to take into consideration statutes involving similar or related subject matters when such statutes shed light upon the meaning of the statute being construed, even though the statutes are found in different chapters and were enacted at different times. Citizen Electric Corporation v. Director of Revenue, *766 S.W.2d 450* (*Mo. Banc. 1999*). When the legislature enacts a statute referring to terms which have had other judicial or legislative meaning attached to them, the legislature is presumed to have acted with knowledge of that judicial or legislative action. *Id* @ 452. When the Missouri legislature passed SORA, we must presume that it had knowledge of Section 610.105 RSMo. and determined that suspended imposition of sentences will be an exception to the requirement to register as a sex offender. Consequently, we should infer from the absence of suspended imposition of sentences in SORA that the legislature never intended for SORA to apply to suspended imposition of sentences.

In Jantz v. Brewer, *30 S.W. 3d 915 (Mo. App. S.D. 2000)*, the Southern District Court of Appeals, when construing Section 452.377 RSMo., a domestic statute regarding relocation of the residence of a child, stated that a disparate inclusion or exclusion of particular language in a statute is "powerful evidence" of the legislative intent. Id @ p. 919. The exclusion of suspended imposition of sentences from SORA is powerful evidence of the legislative intent not to include recipients of suspended imposition of sentences under SORA.

Another rule of statutory construction *is expressio unius est exclusio alterus*, which means that the expression of one thing is the exclusion of another. Schudy v. Cooper, *824 S.W.2d 899* (*Mo. banc 1992*). The expression of guilty pleas and convictions and nolo contendere pleas in Section 589.400 and the exclusion of suspended imposition of sentences indicate a legislative intent not to include suspended imposition of sentences under the sexual registration law.

This Honorable Court, in Yellow Freight Systems v. Mayor's Commission of Human Rights, 791 S.W.2d 382 (Mo. banc 1990), considered the powers created by Section 213.020.3 RSMo. (1986), which vested the state commission on human rights with the power and duty to seek out, eliminate and prevent discrimination. This Honorable Court ruled that the statute did not give the commission the power to enforce violations of municipal ordinances, regarding discrimination. *Id* at 387. The court held that the statutory construction canon, *expressio unius est exclusio alterus*, indicated that the legislature did not intend to grant the commission the power to enforce violations of municipal ordinances in order to prevent discrimination, as the statue enumerated precisely what powers the commission did have and enforcing municipal ordinance violations was not one of them.

In the case at bar, the exclusion of suspended imposition of sentences in Section 589.400, when viewed in light of statute §610.105 RSMo., which was in effect when SORA was passed, leads to the conclusion that SORA does not include suspended imposition of sentences. When a statute enumerates persons

effected it is to be construed as excluding from its effect all those not expressly mentioned. McNally v. St. Louis County Police Department, *17 S.W. 3d 614* (*Mo. App. ED 2000*).

Another statutory rule of construction is that penal statutes are to be narrowly construed. BCI Corporation v. Charlebois Construction Company, *673 S.W.2d 774* (*Mo. banc. 1984*). Because Section 589.425 *RSMo. (2000)* makes it a misdemeanor and sometimes a felony for failure to register, Section 589.400 *et. seq*. is a penal statute and should be strictly construed and held to not include persons who received a suspended imposition of sentence.

In State v. Stewart, 832 S.W.2d 911 (Mo. Banc. 1992), this Honorable Court had the occasion to construe the statute relating to the persistent offender provision for driving while intoxicated offenses, which was ambiguous as to the number of prior alcohol convictions necessary before the persistent offender status applied. The court applied the rule of lenity and found that three rather than two such prior convictions were necessary before the persistent offender status could be invoked. The court stated that even though requiring three rather than two prior alcohol offenses to be found before applying the persistent offender status may not have been the intent of the legislature, the clear words of the statute governed the interpretation. *Id* at 913. The court also stated that as a corollary to that rule, in the case of doubt concerning the severity of the penalty prescribed by a statute, construction will favor a milder penalty over a harsher one. *Id* at 914.

This court, in State v. Stewart, *supra,* also stated that it is an ancient rule of statutory construction that penal statutes should be strictly construed against the government or parties seeking to exact statutory penalties and in favor of persons on whom such penalties are sought to be imposed. *Id* @ 1913. Accordingly, SORA and §610.105 RSMo. should be construed together in favor of appellant.

In State v. Treadway, 558 S.W.2d 646 (Mo. Banc 1977), this Honorable Court considered the question of whether consecutive sentences had to be imposed for the convictions of robbery in the first degree and armed criminal action. *Id* at p.652-653. This court again cited the general rule that a criminal statute must be construed liberally in favor of the defendant and against the state and that penal statutes should be strictly construed against the government or parties seeking to exact statutory penalties and in favor of the persons on whom such penalties are sought to be imposed. *Id* at 652-653.

The court went on to quote 3 Sutherland, Statutory Construction, Section 59.03 (4th ed. 1974), and said:

> "When the law imposes a punishment which acts upon the offender alone, and it is not a reparation to the party injured, then the punishment is entirely within the discretion of the law giver, it will not be presumed that the legislature intended the punishment to extend farther than it was expressly stated." *Id* @ 653.

In the case at bar, imposing the sexual offender registration act upon appellant fits into the rule from 3 Sutherland, Statutory Construction. The state is attempting to impose a punishment which acts upon appellant alone, and is not a reparation to the party injured. Consequently, it should not be presumed that the legislature intended to punish appellant when Section 610.105 expressly states that his suspended imposition shall be a closed record.

When the legislature enacts a statute, the legislature is presumed to have acted with knowledge of the state of the law. Leiser v. City of Wildwood, 59 S.W. 3rd 597 (Mo. App. E.D. 2001). When SORA was enacted in 1995, §610.105 RSMo., regarding suspended imposition of sentences, had already been a law for over fourteen (14) years. [§610.105 RSMo. Cum. Supp. 1981]. Consequently, the Missouri Legislature is presumed to have enacted SORA with knowledge of §610.105 and knowledge that a suspended imposition of sentence was a closed record. Because SORA was enacted and re-enacted, without ever mentioning suspended imposition of sentences, there is a presumption SORA was not intended to apply to them. Repeal of statutes by implication is disfavored and statutes are to be reconciled by the courts when possible. Citizens Electric Corp. v. DOR, 766 S.W. 2d 450 (Mo. banc 1989); Matter of Nocita, 914 S.W. 2nd 358 (Mo. banc 1996).

Another rule of statutory construction states that if two statutes deal with the same subject – one in general terms and the other in specific terms, the general statute yields to the more specific statute. In other words, where two laws relating

to the same subject matter are conflicting, the provisions of one having a special application to a particular subject will be deemed to be a qualification of, or an exception to, the other act general in its terms. IBM v. State Tax Commission, 362 S.W. 2d 635 (Mo. 1962). Applying that canon to the case at bar, the wording in SORA of "…convicted of, been found guilty of, or pled guilty to committing, or attempting to commit one or more of the following offenses…" [§589.400 (2) RSMo. 2000 (Cum. Supp. 2003)] is the general statute and general language, and the reference in §610.105 to suspended imposition of sentences is the specific statute which qualifies suspended imposition of sentences and excepts the same from the other, general act (SORA).

In Edwards v. St. Louis County, 429 S.W. 2d 718 (Mo. banc 1968), this court had the occasion to consider which of two conflicting statutes controlled the rate of interest which counties may fix and pay on general obligation bonds. The court ultimately ruled that the general statute in that case prevailed, but only after focusing on language in the general statute that stated:

"anything… in any law of this state to the contrary notwithstanding," *Id* @ p. 722.

Relating the lesson of Edwards v. St. Louis County, *supra*, to the facts at bar, if the Missouri legislature intended suspended imposition of sentences to be included in SORA, the Edwards language, "anything… in any law of this state to the contrary notwithstanding", would have been included in SORA. Such language was not included, and because § 610.105 RSMo. was in existence

already when SORA came into being, the logical conclusion is that the legislature intended for § 610.105 RSMo. to remain valid and to not cover suspended imposition of sentences. See also Greenbriar Hills v. Director of Revenue, 935 S.W. 2d 36 (Mo. banc. 1996).

In Busic v. United States, 446 U.S. 398 (1980) the United States Supreme Court cited the principal that a more specific statute will be given precedence over a more general one, regardless of their temporal sequence. *Id* @ 406. Consequently, even though SORA was enacted long after § 610.105 RSMo. came into being, the more specific § 610.105 RSMo. should be given precedence. In Busic, *supra*, the United States Supreme Court also cited the rule of lenity which states that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Id.* See also J. S. v. Beaird, 28 S. W. 3d 875 (Mo. banc 2000).

In State ex rel. Eggers v. Enright, 609 S.W. 2d 381 (Mo. banc 1981), this Honorable court again utilized the statutory canon of a specific statute taking precedence over a general statute, and, quoting Folk v. City of St. Louis, 250 Mo. 116, 157 S.W. 71 (1913), stated:

> "When there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statutes." *Id* @ 384.

In Rundquist v. Director of Revenue, 62 S.W. 3d 643 (Mo. App. E.D. 2001), the Eastern District Court of Appeals again used this specific-versus-general statutory construction canon to find that a specific statute prevailed and stated that when a statute enumerates the persons affected, it is to be construed as excluding from its effect all those not expressly mentioned. *Id* @ 647; See also McNally v. St. Louis County Police Dept., 17 S.W. 3d 614, 617 (Mo. App. E.D. 2000).

Because SORA enumerates persons who are "convicted of, been found guilty of, or pled guilty to committing, or attempting to commit…" and excludes suspended imposition of sentences, it too should be construed as excluding from its effect all those not expressly mentioned, e.g., recipients of suspended imposition of sentences.

Although this Honorable Court stated in State v. Larson, 79 S. W. 3rd 891 (Mo. banc 2002) *supra*, *in dictum*, that suspended imposition of sentence recipients must register as sex offenders, the issue of the conflict between § 610.105 RSMo. and § 589.400 RSMo. has never been raised before or decided by this Honorable Court. The issue before this Honorable Court in Larson, *supra*, was whether the defendant, who pleaded guilty to sexual offenses, had a right to appeal the denial of his motion to withdraw his guilty plea after he had received a suspended imposition of sentence. This Honorable Court ruled that appellate jurisdiction was not supported because of the suspended imposition of sentence, see, State v. Ham, 91 S. W. 3rd 676 (Mo. App. ED. 2002), but treated the

defendant's appeal as it would a petition for writ of mandamus to require the circuit court to allow the defendant to request to withdraw his guilty plea. *Id* at 892. In discussing the consequences that might justify a request for a writ to review whether the motion to withdraw his guilty plea was improperly denied, this Honorable Court stated, in passing, that one punitive consequence of the guilty plea was the requirement that the defendant register as a sexual offender. *Id*. @ 894. The issue of the conflict between §610.105 and §589.400 *et, seq*, was not raised or addressed by this Honorable Court.

Appellant herein stands to suffer grievous loss in terms of the invasion to his fundamental rights of privacy, liberty and property interests if he is forced to register his name as a sexual offender under Mo. Rev. Statute §589.400 *et. seq.* when §610.105 RSMo. clearly shields him from that requirement. This is especially true in light of §43.650 RSMo. 2000 (Supp. 2003), which was signed by the governor on July 11, 2003 and became effective August 28, 2003. § 43.650 provides for the names and photographs of all convicted registered sexual offenders to be listed on a state website. Now anyone can look up appellant's photograph and address and invade and intrude upon appellant's private life as they wish. The trial court's decision to deny declaratory and injunctive relief was in error because the plain words of Section 610.105 RSMo. indicate that the record is to be closed. There was no substantial evidence to indicate that appellant should register as a sexual offender when he received a suspended imposition of sentence under a statute which requires such cases to be closed. The Missouri Legislature

chose not to include suspended imposition of sentences in SORA's language (§589.400), knowing full well that when SORA was initially passed (1995) and later revised that §610.105 RSMo. was and had been in existence to shield recipients of this type of judicial proceeding from the stigma and prejudice of public review. See In the Matter of Nocita, supra.

Under the facts of the case at bar, the trial court cannot properly hold that SORA applies to appellant when a clear and obvious statutory shield protects appellant from such an application. Because the trial court's decision was contrary to the weight of the evidence, and because the trial court erroneously interpreted and applied the law, the judgment of the trial court must be vacated.

The Fourteenth Amendment to the United States Constitution guarantees that no state shall deprive any person of life, liberty, or property, without due process of law. (U. S. Const. Amend. XIV, §1.) The United States Supreme Court has held that the state may not deprive a person of liberty or property interests without due process of law. Board of Regents v. Roth 408 U. S. 564 (1972). The right to privacy based on the right to be let alone is part of the right to liberty and pursuit of happiness and this right is derived from natural law and recognized by principles of common law. Y. G. v. Jewish Hospital of St. Louis, 795 S. W. 2d 488 (Mo. App. 1990).

Although neither the federal nor Missouri constitution expressly provide for a right to privacy, there has been a recognized right to privacy and this right has been extended to prevent the disclosure of personal matters. North Kansas City

Hospital Bd. Of Trustees v. St. Luke's Northland Hospital, 984 S. W. 2d 113 (Mo. App. W. D. 1998).

Registration under §§589.400-589.425 invades appellant's privacy and liberty interests because the public, as well as law enforcement officials, have access to private information (including, appellant's photograph) of an inflammatory nature which can lead to diminished employment opportunities and potential risk of personal, physical harm from people who learn about the information. (See Tr. pp 8-9).

Appellant should be able to rely on the law in the State of Missouri, specifically, §610.105-RSMo, and on the promise the prosecution made when he pleaded guilty (Supp. L. F. 11), that his suspended imposition of sentence is a closed record which will not be made available to the public. For the state to now be able to withdraw that promise, and to withdraw the protection of the law which existed when he pleaded guilty and which still exists, is a blatant violation of appellant's due process rights as guaranteed by the United States Constitution (U. S. Const. Amend. XIV, §1) and the Missouri Constitution (Mo. Const. Art I, §10). Appellant should not now have to report in person every ninety (90) days to the chief law enforcement officer of the county, and have his name, crime, address and photograph posted on a state web site. The fact that this statute entails continuous and perpetual reporting requirements demonstrates that it places upon him burdens on him without due process of law.

The prosecution's promise to appellant and the law's promise to appellant that his record would be closed must be honored. Failure to grant appellant these due process protections is violative of appellant's right afforded him by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution.

ARGUMENT II

The trial court erred, to the prejudice of appellant, in denying appellant's Motion For Declaratory Judgment and Preliminary and Permanent Injunction because substantial evidence showed that the Missouri Sex Offender Registration Statutes, Mo. Rev. Stat. §§ 589-400- 589.425, as interpreted by the trial court and applied to this appellant, constitute an impermissible *ex post facto* law in violation of the United States Constitution, Article I, Section 9, clause 3, and the Missouri Constitution, Article I, Section 13.

[Standard of Review-The standard of review in a declaratory judgment case is the same as in any other court-tried case. Guyer v. City of Kirkwood, 38 S.W. 3d 412, 413 (Mo. banc 2001). The judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. Id.]

In Smith v. Doe, 123 S. Ct. 1140 (2003), the United States Supreme Court recently found that Alaska's sexual offender registry law (SORA) did not constitute an *ex post facto* law because Alaska's sexual offender registry law (SORA) is a civil, regulatory scheme and not a punitive law. *Id.* @ 1149.

Appellant asserts that Missouri's §§589.400-589.425-RSMo. are punitive laws. In Smith v. Doe, *supra*, the United States Supreme Court stated the analysis of whether a law constitutes an illegal, *ex post facto* law begins with a

determination of whether the law is penal or civil. Id @ 1146-1147. The Supreme Court in Smith v. Doe, stated:

"We must ascertain whether the legislature meant the statute to establish "civil" proceedings. Kansas v. Hendricks, 521 U. S. 346, 361, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). If the intention of the legislature was to impose punishment, that ends the inquiry." Id @ 1146-1147. (Emphasis Supplied).

In the case at bar, respondent, during the hearings before the trial court, repeatedly stated that §§589.400-589.425 constitute a penal law. (TR. 18, 30, 31). Appellant asserts that the respondent should be held to that position for purposes of this appeal. Consequently, the inquiry about whether Missouri's SORA constitutes a penal law is not an issue the state contests, and this Honorable Court should hold that Missouri's SORA constitutes an *ex post facto* law. If this Honorable Court decides that a further inquiry into Missouri's legislative intent is warranted (despite the state's assertion that Missouri's SORA is penal), then the facts surrounding the statutory scheme in the case at bar still point to a finding that the law is penal and Smith v. Doe, *supra*, should not apply.

Significant differences between Alaska's SORA and Missouri's SORA exist here. To begin with, Alaska's SORA had no in-person reporting requirement. Smith v. Doe, *supra* @ 1151. § 589.414.5 RSMo. 2000 (Cum. Supp.2003) requires appellant to report in person to the sheriff's office every ninety (90) days because appellant's crime involved a minor under the age of eighteen. (L. F. 13; Supp. L. F. 4-5). This distinction in Missouri's SORA

imposes a significantly heavier restraint upon appellant. In Smith v. Doe, *supra*, the United States Supreme Court stated that constitutional objections to a mandatory reporting requirement were beyond the scope of the opinion and were not being addressed in that opinion. *Id*. @ 1152.

The court in Smith v. Doe, *supra*, relied heavily on the prior decision of Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S. Ct. 554, 9 L.Ed. 2d 644 (1963) in determining whether Alaska's Megan Law constituted a punitive law. One of the factors set forth in Kennedy v. Mendoza-Martinez, to determine whether or not a law is punitive is whether the sanction involves an affirmative disability or restraint. Id. 372 U.S. at 168. The requirement to report in person every ninety (90) days is indeed a heavy restraint upon appellant and makes SORA a punitive law.

Another distinction between the facts in Smith v. Doe, *supra*, and the facts *sub judice* is that appellant's suspended imposition of sentence was sealed and closed to the public prior to the request by the respondents to force appellant to register as a sexual offender. Appellant received a suspended imposition of sentence on his sexual assault in the first degree charge. (Tr. p. 6). Pursuant to §610.105 RSMo., the record was closed to the public. (See Argument I, *supra*). Consequently, only the application of SORA to appellant allowed public access to the crime. If appellant is not forced to register as a sexual offender pursuant to

SORA, the public will not have access to his judicial proceedings, or to his photograph and address. See §43.650 RSMo. 2000 (Cum. Supp. 2003).

In Smith v. Doe, *supra*, the petitioners were all convicted of aggravated sexual offenses and the convictions were already "in the public domain." Id @ 1151. The Supreme Court in Smith v. Doe, found the fact that the convictions of the petitioners were already matters of public record persuasive in finding that Alaska's SORA was not punitive. A contrary finding is thus warranted in this case, as the suspended imposition of sentence shielded appellant from the public and consequently the attendant ridicule, scorn and in-person reporting requirement.

Another distinction between the SORA in Smith v. Doe, *supra*, and Missouri's SORA which points to the latter being punitive is the manner of its codification. The Supreme Court in Smith v. Doe, *supra*, noted that the notification provisions of Alaska's SORA were codified in the State's Health, Safety and Housing Code. Id. @ 1148. The Supreme Court reasoned that by placing the notification provisions in a civil, non-criminal, state authoritative text, an objective by the legislature to create a civil procedure could be inferred. Id.

Missouri's SORA, on the other hand, is contained under the "Crime and Punishment" heading of the Missouri statutes and the registration and notification requirements are contained in the statutes themselves, §§589.400–589.425. §589.407 RSMo. 2000 (Cum. Supp. 2003) lists the information requirements for the registration and states that the registration shall be entered on a form

developed by the Missouri state highway patrol. *Id*. § 589.410 RSMo (2000) informs law enforcement authorities how to transfer the information to the Missouri state highway patrol and within what time frame. Id. § 589.414 RSMo (2000) details the procedures to be followed when a registrant changes addresses. Id.

§589.403 RSMo. (2000) requires prisons and mental health institutions to inform inmates who are being freed of the inmates' duty to register as sexual offenders. This section also requires the institutions to obtain forwarding addresses from the inmates and to provide those addresses to the chief law enforcement official of the county where the inmate will reside.

§589.405 RSMo. (2000) requires courts to inform criminal defendants of the registration requirements of SORA and to obtain and forward the addresses of such criminal defendants to the chief law enforcement official of the county where the person expects to reside.

Because the Supreme Court in Smith v. Doe, *supra*, inferred a legislative intent to deem the law a civil one from the fact that Alaska's registration and notification procedures were codified in the state regulations manuel, a legislative intent to deem Missouri's SORA a punitive law can be inferred from its inclusion under "Crimes and Punishment" and from the implementing procedures being contained in the statutes themselves under the same heading.

The Supreme Court in Smith v. Doe, also concluded that Alaska's SORA was nonpunitive and civil based upon the fact that, aside from the duty to register,

the statute itself mandated no procedures, but instead vested the authority to promulgate implementing regulations with the Alaska Department of Public Safety. *Id.* @ 1149. Missouri's SORA not only mandates the duty to register, but also requires persons such as appellant, who received a suspended imposition of sentence for a sex crime involving a minor, to report in person every ninety days to the county law enforcement agency to verify the information contained in their statement. §589.414.5 RSMo 2000 (Cum. Supp. 2003). Additionally, §589.414.2 RSMo. 2000 (Cum. Supp. 2003) requires registrants to appear in person when they change addresses to another county.

The Supreme Court in Smith v. Doe, *supra*, also based its conclusion that the law was nonpunitive and civil due to the expressed objective of the law, "protecting the public from sex offenders", being written into the SORA itself. Id. @ 1147. The Supreme Court reasoned that because the legislature had written into the statute itself the objective of the law and the legislature also included language in the statute that the release of certain information about sexual offenders to the public will assist in protecting public safety, the legislature had expressed a legitimate, nonpunitive governmental objective in the statute *Id*. @ p. 1147, See also Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2D 501 (1997).

Missouri's SORA contains no express legislative intent to make the statute nonpunitive, and, as discussed in the proceeding paragraphs, the indications in Alaska's SORA that the statute was nonpunitive are absent in this case involving

Missouri's SORA. Not only does the statutory text of §§ 589.400 – 589.425 not include an express legislative intent to make the law nonpunitive, the statutory codification of the implementing procedures, the heading under "Crimes and Punishment" and the in-person reporting requirements all point to a punitive law. The fact that appellant's suspended imposition of sentence shield, pursuant to §610.105 RSMo. 2000 (Cum. Supp.2003), prevents the disclosure of his status as a sexual offender, also leads to the conclusion that SORA is a punishment inflicted upon appellant. In fact, the respondents at the evidentiary hearing before the trial court, argued that Misssouri's SORA is a penal law. The assistant counselor at the first hearing stated:

> "MR. HADEN: If I might add, I don't think Mr. Cullom gets to have it both ways. It's either a criminal law or it's a civil law. I think it is pretty clear that it's a penal law because he's asking us not to prosecute him for violating it. So it's a penal, criminal law. And if you'll note the State versus Thomaston case cited on the second paragraph of this, if it's a criminal law, the retrospective analysis doesn't apply. You have to go to the *ex post facto* analysis." (Tr. p. 18).

At a later hearing on the merits of the case, the assistant county counselor then stated:

> "MS. KEDIGH: Yes. In regard to the *ex post facto* analysis, *ex post facto* analysis only applies to criminal laws. In this case the Sexual Offender Registration Act in Missouri is a criminal law because its

violation is punishable as a misdemeanor for the first offense and a felony for the second offense. So the *ex post facto* analysis applies, which the Supreme Court, U. S. Supreme Court, looked at in Smith versus Doe. And they looked at the intent of the legislature in speaking to the – leaving the exact scheme to a regulatory body. They did that to determine if it was a law that was regulatory in nature or punitive in nature, to see if it violated the *ex post facto* clause.

In the case of Missouri's law, they don't cite a purpose in the law, but it was placed in the Crime Prevention and Control Programs and Services sections of the law, along with sexual assault prevention, Missouri Crime Prevention Information Center and the Interstate Compact for Adult offender supervision. So the intent is discerned from that, which is the protection of the public. And moreover, (sic) the J. S. versus Beaird case, the Court ruled that the law was enacted to protect the State's children. So I think looking at what the U. S. Supreme Court did was to just determine if it was regulatory in nature and designed to protect the public. And I think we can see from Missouri's placement, the codification of that law within that section of Crime Prevention and Control, as well as the pronouncement in J. S. versus Beaird by our state Supreme Court, that it is protection of the public. The retrospective analysis does not apply, because this is a criminal law, not a civil law." (Tr. pp 30-31).

SORA, as applied to appellant, is an *ex post facto* law and violates the United States Constitution, Article I, Section 9, Clause 3 and the Missouri Constitution, Article I. Section 13. When the crimes with which appellant were charged were committed, and later when appellant was charged with those crimes in 1994, SORA did not exist. SORA did not take effect as law until January 1, 1995. § 566.600 RSMo. (Later Repealed and Replaced by § 589.400 *et. seq*). Obviously, if this Honorable Court determines, as appellant argues, that the law is punitive, SORA constitutes an *ex post facto* law and Smith v. Doe, *supra*, is distinguishable on the facts involving the respective sexual offender statutes in Alaska and Missouri and on the respective petitioners in Alaska and in the case *sub judice*.

The United States Supreme Court recently upheld a constitutional challenge to Connecticut's SORA law in Connecticut Dept. of Public Safety v. Doe, 123 S. Ct. 1160 (2003). The constitutional challenge in that case, however, was based on procedural due process. The petitioners in Connecticut Dept. of Public Safety v. Doe, argued that because they were denied a predeprivation hearing to determine whether they are likely to be "currently dangerous", Connecticut's SORA violated the procedural due process protection of the United States Constitution. *Id*. @1164-1165. Connecticut Dept. of Saftey v. Doe, did not involve an *ex post facto* challenge or a retrospective challenge to the law, and thus that opinion does not provide authority for the facts in the case at bar.

SORA is *ex post facto* in that it reaches back and penalizes appellant, based upon a crime which did not include this penalty at the time it was committed. Fults v. Mo. Bd. of Probation and Parole, 857 S.W. 2d 388 (Mo. App. 1993). And a law can be *ex post facto* in effect, if not in purpose. Weaver v. Graham, 450 U.S. 24, 31 (1981). Additionally, appellant is significantly prejudiced by the disclosures of his sexual offense to the public, which would be prevented by § 610.105 RSMo. 2000 (Cum. Supp 2003), if not for the *ex post facto* application of SORA to him.

Appellant's vested right in retaining his freedom from state interference is greatly impaired if he has to report to law enforcement officials every ninety (90) days. Appellant's continued enjoyment of his liberty and privacy interests are seriously damaged by any requirement to submit to this law, including appellant's constitutional right to travel freely among the counties and between the states, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Appellant aptly demonstrated to the trial court the requisite showing of the *ex post facto* nature of SORA, as applied to appellant, and the trial court committed reversible error in denying appellant relief in the form of a declaratory judgment and injunctive relief.

ARGUMENT III

The trial court erred in denying appellant's motion for declaratory judgment and preliminary and permanent injunction in that equitable estoppel should operate against the state and prevent it from enforcing the statute against appellant because the application of the Missouri Sex Offender Registration Statutes, Mo. Rev. Stat. §589-400-589.425, to appellant would impose new legal obligations upon appellant and constitute an impermissible retrospective application of law in violation of the Missouri Constitution, Article I, Section 13.

[Standard of review – The standard of review in a declaratory judgment case is the same as in any other court – tried case. Guyer v. City of Kirkwood, 38 S. W. 3d 412, 413 (Mo. banc. 2001). The judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Id.*]

Article I, § 13 of the Missouri Constitution provides "[T] that no *ex post facto* law, nor law impairing the obligations of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted." A law is considered retrospective where; (1) it imposes a new obligation, duty or disability relating to a past transaction; or (2) it removes or

impairs a vested or substantial right. Corveru Abutemont Tech. Inc. v. Air Conservation Commn., 973 S.W. 2d 851 (Mo. banc. 1998).

§589.400 *et. seq* imposes new obligations and duties relating to a past transaction and impairs a substantial right. Appellant's crime occurred in 1994. (Tr.. p. 6; Cum. Supp L. F. 2-3). The Sexual Offender Registration Act, SORA, became effective on January 1, 1995. Because SORA requires appellant to report, in person, with the chief law enforcement official in the county every ninety (90) days, §589.414 (4) SORA obligates duties upon Appellant relating to a past transaction. And because SORA impairs appellant's right to freely associate, it impairs a substantial right. SORA operates retrospectively to effect the past transaction or crime to the substantial prejudice of appellant. See Fisher v. Reorganized School District No. R-V of Grundy County, 567 S.W. 2d 647 (Mo. banc 1978).

A vested right is one that is more than a mere expectation based upon an anticipated continuance of existing law. Fisher, *supra* @. p. 649. A vested right must have become a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of the demand, or a legal exemption from a demand made by another. *Id.*

Substantive laws generally fix and declare the primary rights of individuals concerning their person and property, and the remedy available in the case of invasion of those rights. State ex rel. Webster v. Myers, 779 S. W. 2d 286, 289 (Mo. App. W.D. 1989). Remedial laws are generally laws that affect only the

remedy provided, including laws which merely substitute a new or more appropriate remedy for the enforcement of an existing right. Faulkner v. St. Luke's Hosp. 903 S.W. 2d 588 (Mo. App. W.D. 1995).

SORA is a substantive law, declaring the primary legal obligations of sex offenders and the criminal consequences if those legal obligations are not met.

Appellant's rights to be free from the continued stigma of public ridicule and scorn, not to mention continued vengeance from the public (Tr p. 8-9), and to be free from the legal obligation to report as a sexual offender, in person, every ninety (90) days, fall within the constitutional protection of the Missouri Constitution, Article I, Section 13. Because the trial court's decision was contrary to the weight of the evidence, and because the trial court erroneously interpreted and applied the law, the judgment of the trial court must be vacated. There was no substantial evidence to support the trial court's judgement.

Although procedural statutes, not affecting substantial rights, may be applied retrospectively without violating the constitutional ban on retrospective laws, See Burns v. Labor & Indus. Relations Com'n, 845 S.W. 2d 553 (Mo. banc 1993), SORA is not a procedural statute. SORA is a substantive law that relates to rights and duties that give rise to a cause of action. Failure to register is initially a class A misdemeanor, and a subsequent violation constitutes a class D Felony. §589.425 RSMo. (2000). SORA creates new obligations and beyond that, creates new crimes that did not exist when appellant committed his crime in 1994. (Tr. p. 6; Supp. L. F. 4-5).

SORA relates back to appellant's crime in 1994 and gives it a different effect from that which it had under the law when the crime occurred. See Gonzalez v. Labor and Industrial Relations Commission, 661 S.W. 2d 54, 56 (Mo. App. 1983). In State ex rel. Webster v. Cornelius, 729 S.W. 2d 60 (Mo. App. E.D. 1987), the defendants were prosecuted under the Missouri Merchandising Practices Act. The action against the defendants was commenced and while the action was pending, the Missouri Merchandising Practices Act was revised to allow for the state to recover additional costs and damages in prosecuting such merchandising violations. The trial court in State ex rel. Webster v. Cornelius, *supra*, entered judgment for the state allowing for the additional costs and damages against the defendants, and the Eastern District Court of Appeals reversed that judgment, holding that the revised statute attached new disabilities to the defendants and that the application of the revised statute to the defendants violated Article I, § 13 of the Missouri Constitution.

In U. S. Life Title Ins. Co. v. Brents, 676 S.W. 2d 839 (Mo. App. W.D. 1984), the Appeals Court held that a law governing interest rates on residential mortgages was prospective only in its application. The court noted that the law provided criminal penalties for its violations and stated:

"Laws providing for penalties and forfeitures are always given only prospective application, and retrospective application would render such a statute unconstitutional". *Id* @ p. 842.

In the case at bar, application of SORA to appellant renders SORA unconstitutional, and this Honorable Court should vacate the judgment of the trial court.

In State ex rel. Western Outdoor Adv. v. Highway Com'n, 813 S.W. 2d 360 (Mo. App. W.D. 1991), a billboard company sought review of a decision by the Missouri Highway Commission ordering said company to remove one of its billboards. Between the time the highway commission first notified the company of the violation in 1976, and the time the highway commission ordered the company to remove the sign in 1989, the state regulations regarding billboards had changed so as to delete the right of the billboard company to take remedial action after notification and bring the sign into conformance with state regulations. *Id.* @ 362. The Western District Court of Appeals ruled that the application of the new state regulations violated the Missouri constitution, Art. I, §13, and stated that laws affecting substantive rights shall not be applied retrospectively in administrative cases. *Id* @ 363.

In the case *sub judice*, the application of SORA to appellant likewise violates Article I, § 13 of the Missouri Constitution and affects appellant's substantive rights. The application of SORA to appellant herein impermissibly reaches back and abrogates a vested right and imposes new duties upon appellant. The judgment of the trial court should be vacated.

At the arguments on the merits of the case before the trial court, appellant informed the trial court that Article I, § 13 of the Missouri Constitution prohibits

retrospective laws and that SORA was a retrospective law with respect to appellant. (Tr. pp. 14-19, 25-29). The trial court never really addressed those arguments, but merely stated in response to counsel's question about whether the court was finding SORA to be punitive or civil,

> "I'm saying I'm not exactly certain what it is. Okay? I'm saying that I think the trend in the law is that the legislature could have done what it did here in requiring sex offenders to register with the local authorities. And I think beyond that, it has to be clarified at the appellate level."
>
> "I'm not punting on this. I think it honestly has to be resolved at both the appellate level and potentially at the Supreme Court level. And I'm just putting you in a posture to do that."(Tr. p. 34-35).

Likewise, the judgment of the trial court did not address the retrospective law argument. (L. F. 41).

Recently, in Smith v. Doe, 123 S. Ct. 1140 (2003), the United States Supreme Court had the occasion to address the constitutionality of Alaska's SORA law. The issue there was whether the Alaska SORA law could be applied retroactively without constituting an *ex post facto* law. *Id.* In finding that the law was nonpunitive and merely a civil regulatory scheme, the United States Supreme Court found that its retroactive application did not constitute and *ex post facto* law. *Id.* @ 1154.

The finding in Smith v. Doe, *supra*, is significant to the issue here as to whether SORA in Missouri constitutes a retrospective law. If this Honorable Court finds that §§ 589.400-589.425 is not punitive, but civil, and rejects appellant's Argument II herein (See Argument II, *supra*), then the only logical conclusion is that the law is a civil law, and therefore violates Article I, Section 13 of the Missouri Constitution's prohibition against retrospective laws.

The state should be equitably estopped from violating the closed record that was given to appellant pursuant to his plea bargain (Tr. 6; Supp L. F. 11) and from denying appellant the protections afforded him by §610.105. Equitable estopped will lie to prevent a party who makes a representation, which the other party relies on in good faith, from retracting that representation. Lake St. Louis Community Ass'n v. Ravenswood Properties, Ltd., 746 S. W. 2d 642 (Mo. App. 1988). Appellant performed his part of the plea bargain with the state and successfully completed the term and conditions of his probation. The state should be held to its obligation that §610.105 RSMo. would protect appellant from public scrutiny and scorn.

Appellant is fully justified in his expectation that he will be protected under §610.105 RSMo. The application of SORA to appellant requires new obligations from appellant and results in the loss of his liberty, privacy and property interests. The state should not be allowed to reach back and deprive appellant of the protection of §610.105 with a law, SORA, which did not exist when the crime in

this case was committed. To do so results in a manifest injustice and the state should be equitably estopped from enforcing SORA against appellant.

The application of this law to appellant under these circumstances and facts, impermissibly reaches back and takes away a vested right and also imposes new obligations on appellant, in violation of Article I, Section 13 of the Missouri Constitution and the judgment of the trial court should be vacated.

CONCLUSION

This appeal not only involves the conflict between §589.400 *et. seq.* RSMo. and §610.105 RSMo., but also the constitutionality of §589.400 *et. seq.*

This Honorable Court can avoid addressing the constitutional challenge to §589.400 *et. seq.* by resolving the conflict between §589.400 *et. seq.* and §610.105 in favor of appellant (Point I). Several statutory construction canons, including, *inter alia, in pari materia, expressio unius est exclusio alterus* and the priority of specific statutes over general statutes, require a ruling that §610.105 prevails and appellant should be immune from having to register as a sexual offender.

This Honorable Court can also find that §589.400 *et. seq.* is unconstitutional because it constitutes an *ex post facto* law, or a retrospective law, in violation of the Missouri Constitution, Article I, Section 13 as applied to appellant, and appellant should therefore be immune from registering as a sexual offender.

Appellant prays that this Honorable Court will reverse the decision of the trial court with regard to its denial of appellant's request for declaratory judgment and permanent injunctive relief and remand the issue to the trial court with instructions to enter a permanent injunction against the chief law enforcement official for the county and the county prosecutor to prohibit them from forcing appellant to register under the Missouri Sex Offender Registration statute and

from prosecuting him for any failure to do so because the law does not clearly apply to him.

Respectfully submitted,

_____

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Certification of Word Processing Program, Compliance and Diskette

Comes Now Appellant, R. W. by and through his undersigned counsel, John R. Cullom, and pursuant to Missouri Supreme Court Rule 84.06 hereby states the name and version of the word processing software that he has used to prepare the brief is Microsoft Word '97.

Appellant also states that the diskette has been scanned and is virus free.

Appellant further states that the number of words is 14,664.

Respectfully submitted,

_____

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Certification of Service

I hereby certify that two copies of the above and foregoing Appellant's Brief were hand-delivered this ____ day of April, 2004, to:

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APPENDIX

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